ORIGINAL

Number 88-317

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1987

JACK R. DUCKWORTH, Warden,

Petitioner,

vs.

GARY JAMES EAGAN,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The above named Respondent, Gary James Eagan, by his attorney, Howard B. Eisenberg, respectfully alleges and shows the Court as follows:

1. Respondent was granted leave to proceed in forma pauperis in this case by both the United States District Court for the Northern District of Indiana and the United States Court of Appeals for the Seventh Circuit.

2. The undersigned attorney was appointed by the United States Court of Appeals for the Seventh Circuit to represent Respondent pursuant to the provisions of the Criminal Justice Act of 1964, as amended.

3. Respondent remains confined at the Indiana State Penitentiary at Michigan City, Indiana serving the sentence

attacked in this case.

4. Counsel believes that Respondent remains indigent, unable to pay the costs of this matter.

For these reasons, pursuant to Supreme Court Rule 46, Respondent respectfully moves this Court for leave to proceed *in forma pauperis* without the paying of costs and without the necessity of printing the enclosed Brief in Opposition.

Dated this 16th day of September, 1988.

Respectfully submitted,

HOWARD B. EISENBERG

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Carbondale, Illinois 62901

(618) 536-4423

ATTORNEY FOR RESPONDENT

Number 88-317

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1987

JACK R. DUCKWORTH, Warden,

Petitioner,

vs.

GARY JAMES EAGAN,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEY FOR RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

1. Did the police properly comply with the requirements of Miranda v. Arizona, 384 U.S. 436 (1966) when they informed Respondent, prior to a custodial interrogation, that although he had the right to counsel, "[w]e have no way of giving you a lawyer but one will be appointed for you, if you wish, if and when you go to court."

2. Should this Court exercise its discretion to review the admissibility of Respondent's second statement when there is no record in either state or federal court of the circumstances of that statement and when the only relief granted by the Court of Appeals was to remand the case to the District Court for fact finding?

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ARGUMENT

I

THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH PREVIOUS DECISIONS OF THIS COURT, LONG ESTABLISHED LAW IN THE CIRCUIT, AND THE MAJORITY OF DECISIONS OF OTHER COURTS.

A. The Decision in this Case was Consistent with Well Established Law in the Circuit.

The interrogation in this case took place in 1982, a full decade after the United States Court of Appeals for the Seventh Circuit ruled that these precise admonitions violated the mandate of Miranda v. Arizona, 384 U.S. 436 (1966), United States ex rel. William v. Twomey, 467 F.2d 1248 (7th Cir. 1972). Several years later William was reaffirmed by the Court of

Appeals in United States ex rel. Placak v. State of Illinois, 546 F.2d 1298, 1300 (7th Cir. 1976). The decision in this case simply reaffirmed well established law in the Circuit.

B. The Decision in this Case is Consistent with the Majority of Cases Raising this Precise Issue.

Without question, there is a split of authority on the question of the validity of Miranda warnings which inform the suspect that although he has the right to counsel, the police "have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court." Contrary to the impression created by the State's Petition, however, the majority of courts which have considered the validity of these precise Miranda warnings have found them to be fatally defective because they condition the suspect's right to counsel on his appearance in court. This is certainly true of state appellate courts, Brown v. State, 396 S.2d 137 (Ala.App. 1981); State v. Cassell, 602 P.2d 410 (Alaska, 1979); Moore v. State, 251 Ark. 436, 472 S.W.2d 940 (1971); People v. Clark, 2 Cal.App.3d 510, 82 Cal.Rptr. 393 (1969); Brooks v. State, 229 A.2d 833 (Del. 1979); Cribbs v. State, 378 S.2d 316 (Fla.App. 1980); State v. Grierson, 95 Ida. 155, 504 P.2d 1204 (1972) (dictum); State v. Carpenter, 211 Kan. 234, 505 P.2d 753 (1973); State v. Dass, 184 Mont. 116, 602 P.2d 142 (1979); State v. Robbins, 4 N.C.App. 463, 167 S.E.2d 16 (1969); Commonwealth v. Johnson, 484 Pa. 349, 399 A.2d 111 (1979); State v. Creach, 77 Wash.2d 194, 461 P.2d

329 (1969).

The circuits are split on the propriety of these admonitions. The Second and Fourth Circuits have refused to overturn convictions based on substantially similar Miranda warnings, Massimo v. United States, 463 F.2d 1171 (2nd Cir. 1972), cert. denied, 409 U.S. 1117 (1973); Wright v. North Carolina, 483 F.2d 405 (4th Cir. 1973), cert. denied, 415 U.S. 936 (1974). The Fifth and Ninth Circuits have split on the issue, both upholding and rejecting the specific language involved in this case. compare, Gilpin v. United States, 415 F.2d 638 (5th Cir. 1969) with United States v. Lacy, 446 F.2d 511 (5th Cir. 1971), and United States v. Garcia, 431 F.2d 134 (9th Cir. 1970) with United States v. Noa, 443 F.2d 144, 146 (9th Cir. 1971).

The Tenth Circuit, in reversing a conviction, noted:

> ..we think the sentence: "we have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court" immediately following a statement of a present right to retained and appointed counsel is likely to confuse an unsophisticated mind.

Sullins v. United States, 389 F.2d 985, 988 fn. 2 (10th Cir. 1968). The prior decision relied upon by Petitioner (Petition p. 12), Coyote v. United States, 380 F.2d 305, 307 (10th Cir. 1967), cert. denied, 389 U.S. 992 (1967) was not dealing with the same type of admonitions involved in this appeal.

The First, Third, Sixth, Eighth*, and District of Columbia Circuits have not dealt with the precise issue raised in this

case.

Of particular interest is one of the most recent cases dealing with this issue, United States v. Contreras, 667 F.2d 976 (11th Cir. 1982), cert. denied, 459 U.S. 849 (1982). Petitioner contends (Petition, p. 13) that Contreras is contrary to the decision of the Court of Appeals in this case (Petition, p. 13). A complete reading of the decision, however, reveals that it supports the action of the Court of Appeals here. In Contreras the accused was informed only that counsel could be appointed by the court. The Eleventh Circuit considered the impact of this Court's decision in California v. Prysock, 453 U.S. 355 (1981) on Miranda warnings which informed the defendant that counsel would have to be appointed by the court. On page 13 of the Certiorari Petition the State quotes some of the Eleventh Circuit's reasoning. Immediately following the quoted the language, however, the court said:

> Prysock thus stands for the proposition that a Miranda warning is adequate if it fully informs the accused of his right to consult with counsel prior to questioning and does not condition the right to appointed counsel on some future event. (emphasis added)

667 F.2d at 979. Following this observation is a footnote which gives as examples of improper warnings a statement that counsel

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*The Eighth Circuit case relied upon by Petitioner, Klinger v. United States, 409 F.2d 299 (8th Cir. 1969), cert. denied, 396 U.S. 859 (1969) did not involve a Miranda warning which conditioned the right to counsel on some future event, i.e., counsel would only be provided "if and when" the suspect went to court.

would be available "if" the suspect went to court, citing, United States v. Garcia, supra., Gilpin v. United States, supra., and People v. Bolinski, 260 Cal.App.2d 705, 718, 67 Cal.Rptr. 347 (1968). It is thus apparent that the Eleventh Circuit would find the instant warnings to be conditional and, thus, invalid.

Respondent readily acknowledges that there is a split of authority on the precise issue presented here. However, the majority of the decided cases are in accord with the Seventh Circuit's decision here. In addition, this is an issue which was hotly litigated in the decade following Miranda. It is not a question which is being currently litigated. Indeed, as demonstrated above, it is only because the authorities failed to follow well established law in the Circuit that this case arose. This issue has been resolved in the Seventh Circuit, it is not being currently litigated elsewhere, and there is no occasion for this Court to consider the question now.

C. The Warnings Given in this Case Violated the Letter and Spirit of Miranda.

Petitioner engages in some prosecutorial wishful thinking in asserting at page 9 of the Petition that recent decisions of this Court cast doubt on the decision of the Court of Appeals in this case. While it may be helpful to Petitioner to suggest that this case involves "magic words" (Petition, p. 9) or a "hypertechnical application of Miranda" (Petition, p. 11), such

is clearly not the case. The admonitions afforded Respondent here violated the letter and spirit of the Miranda decision.

The warnings given plainly say that Eagan could not have an attorney to assist him unless he went to court. Thus, if he did not go to court, he would not get an attorney. If the interrogation was prior to his appearance in court there was "no way" he could obtain one, if indigent. Manifestly these warnings misstated a central requirement of Miranda--that counsel be provided prior to the interrogation. Here the warnings were invalid because they condition the right to counsel on appearing in court.

The issue here is not one of semantics--it is a question of Respondent's substantive rights under the Fifth and Fourteenth Amendments. The warnings can only be read in one way--to deny Respondent's right to counsel during the interrogation. This is what Miranda prohibited, and this is why the decision of the Court of Appeals is correct and entirely consistent with the decisions of this Court.

II

GIVEN THE LACK OF A EVIDENTIARY RECORD IN EITHER THE STATE OR FEDERAL COURT, REVIEW OF RESPONDENT'S SECOND STATEMENT IS CLEARLY PREMATURE.

Petitioner also asks this Court to review the admissibility of Eagan's second statement, obtained after he was afforded less defective Miranda warnings. Respondent submits that such issue

is not ripe for consideration by this Court. The remedy granted by the Court of Appeals was to remand this case to the District Court with directions to grant Respondent an evidentiary hearing on the admissibility of the statement given after the second set of Miranda warnings. Petitioner apparently argues that the statement given after these more correct admonitions was admissible and that remand is not warranted. The problem with this argument is that there was no evidentiary hearing held in the District Court initially and there is literally no record of what occurred in the state court. Indeed, the following is the entire record of the state court proceedings on the admissibility of Respondent's confessions:

> Comes now the State of Indiana by its Prosecuting Attorney, by Deputy Prosecutor, Daniel Bella, and comes also the Defendant, Gary James Eagen (sic), in his own proper person and by Counsel, David Schneider, in open court, and this cause is submitted on Defendant's Motion to Suppress Written Statements.
>
> Evidence is heard and Arguments are had, and the Court being duly advised, now denies Motions to Suppress.
>
> State Court Record, p. 39.

While Petitioner asks this Court to grant deference to the state court's factual findings, it is perfectly apparent that no factual findings were made in the Indiana courts. There is no transcript of the suppression hearing, and the trial court made no findings of fact. While the Indiana Supreme Court found the statements "voluntary", that Court had no record before it upon which to make such a determination. Even assuming that normally

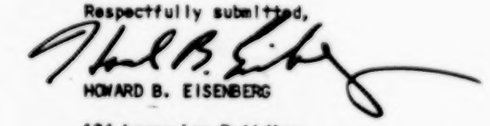
a state appellate court's "findings of facts" would be entitled to deference when a federal court reviews on habeas corpus, certainly the law cannot be that the reviewing federal court is bound to accept the state appellate court's factual determination when there is no record upon which to base such findings and when the judge who actually heard the evidence made no findings of fact. Certainly, it would be unconstitutional for the Court to defer to the state court under such circumstances, cf. Jackson v. Virginia, 443 U.S. 307 (1979) (unconstitutional for state to convict when no reasonable trier of fact could find evidence sufficient).

Given the total lack of evidentiary record upon which to make any decision regarding the second statement, this is clearly not the sort of case which should be considered by this Court in the exercise of its discretion.

CONCLUSION

For the reasons specified herein, Respondent respectfully urges the Court to deny the instant Petition for Writ of Certiorari.

Respectfully submitted,



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